

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

In the Matter of Application 16917) Source: Los Gatos Creek
by San Jose Water Works) County: Santa Clara

Decision No. D 919

Decided: December 4, 1958

Appearances at Hearing Conducted at San Jose on March 12, 1958,
by Henry Holsinger, Chairman, W. P. Rowe, Member, and
Ralph J. McGill, Member, State Water Rights Board:

For the Applicant:

San Jose Water Works Charles B. Leib, Attorney

For the Protestant:

William W. Lester L. D. Bohnett, Attorney

DECISION

Substance of the Application

Application 16917, filed March 6, 1956, is for a permit to appropriate 200 acre-feet of water per annum by storage from Los Gatos Creek between January 1 and December 31 of each year for domestic, municipal, and industrial purposes. The proposed storage will be effected by increasing the capacity of the applicant's existing Lake Elsman (surface area 100 acres,

capacity 6,000 acre-feet) by placing sandbags in the spillway of Austrian Dam to a height of approximately 2 feet. Austrian Dam was constructed pursuant to Permit 7154 (Application 11693) which allows an appropriation from Los Gatos Creek of 9,000 acre-feet per annum by storage. As the terminal date for diversion to storage under Permit 7154 is April 30, and as the applicant cannot obstruct the spillway with sandbags prior to May 15, a permit with a later storage season is required to effect the additional 200 acre-feet proposed storage. Under Application 16917, as is done under Permit 7154, the water is to be collected to storage at a point within the NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 23, T9S, R1W, MDB&M*, and subsequently released into the natural stream channel for conveyance to a point of rediversion (Ryland Dam) within the SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 9, T9S, R1W. From Ryland Dam the water is to be conveyed through a pipeline and metal flume for use within the cities of San Jose, Los Gatos, Saratoga and adjacent territories having a present population of 250,000.

Protests and Answers

Protests against the approval of Application 16917 are of record from Shelly R. Cothran and from William W. Lester.

Shelly R. Cothran protested the application on the basis of alleged riparian rights and use of water from the source

* Hereinafter all township and range designations are with reference to Mount Diablo Base and Meridian (MDB&M).

for over 80 years, claiming that injury will result by approval of the application as he will be deprived of all beneficial uses of water to the extent of 200 acre-feet per annum by reason of the fact that the application is, according to Mr. Cothran, a device to take water without compensation and is an artifice to obtain a title by prescription. He asserts that the proposed appropriation will be a cloud upon the title of his riparian right and will deprive him of all current beneficial uses of water for domestic, irrigation, and homesite purposes.

William W. Lester protested the approval of Application 16917 on the basis of License 520 (Application 1733), alleging that if the proposed appropriation is allowed and permit issued, use of water by the applicant will reduce the supply of water at Lester's point of diversion which already experiences a shortage of water. License 520 confirms a right to appropriate 3.50 cubic feet per second from about May 1 to about December 1 of each year. The total amount diverted, however, shall not exceed 510 acre-feet per annum.

No formal answers to these protests have been received.

Hearing

Application 16917, having been completed in accordance with provisions of the Water Code and applicable administrative rules and regulations of the Board, was set for public hearing under the provisions of the California Administrative Code, Title 23, Waters, before the Board, commencing on Wednesday, March 12, 1958, at 10:00 o'clock a.m. in San Jose, California.

The applicant and protestants were duly notified of the hearing. Protestant Cothran made no appearance.

Description of Watershed

According to the United States Geological Survey quadrangles of the area (Board Exh. 7), Los Gatos Creek rises in projected Section 34, T9S, R1E, at an elevation of 3,440 feet on the western slope of Loma Prieta in the Coast Range and flows westward about 2 miles thence northwest about 2 miles into Lake Elsman (spillway elevation 1,145 feet) created by Austrian Dam of the applicant located within the NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 23, T9S, R1W, and being the applicant's proposed point of diversion under Application 16917. The creek continues its northwesterly course below Austrian Dam for about 4 miles to Lexington Reservoir of Santa Clara Valley Water Conservation District which is formed by Lexington Dam (spillway elevation 645 feet) within the SE $\frac{1}{4}$ of Section 29, T8S, R1W. Below Lexington Dam the creek flows north approximately 1 mile through a break in the hills onto the valley floor near the town of Los Gatos. Below Los Gatos the creek meanders in a northeasterly direction about 10 miles to a confluence with Guadalupe River in the SE $\frac{1}{4}$ of projected Section 7, T7S, R1E, at an elevation of about 75 feet.

Vasona Dam of Santa Clara Valley Water Conservation District which is used only for the regulation of water released from Lexington Reservoir (R. T., p. 54) is located on Los Gatos Creek immediately downstream from the town of Los Gatos.

Protestant Lester's point of diversion is located within the Vasona Reservoir area (R. T., p. 80) within the SW $\frac{1}{4}$ of projected Section 10, T8S, R1W.

The applicant's point of rediversion (Ryland Dam) is on Los Gatos Creek about 3.5 miles downstream from Austrian Dam and about 2.5 miles upstream from Lexington Dam.

Operation of Lake Elsman

As previously stated, Permit 7154 (Application 11693) provides for storage in Lake Elsman created by Austrian Dam. This permit allows 9,000 acre-feet to be collected to storage between about November 1 of each year and about April 30 of the succeeding year. Lake Elsman has a capacity of 6,157 acre-feet; however, more may actually be impounded under the permit due to necessary releases for municipal purposes during the time water is being collected to storage (R. T., pp. 11, 12, 36, 37, and 63).

After being stored in Lake Elsman, the water is released into the natural channel and permitted to flow downstream to Ryland Dam. From the dam the water is diverted into a pipeline and flume to Los Gatos Reservoir (a small offstream reservoir near the south limits of the town of Los Gatos) or directly into the town of Los Gatos. Thereafter, the water is used for municipal purposes in Los Gatos, Saratoga, San Jose, Campbell, Monte Sereno, and parts of Cupertino (R. T., pp. 13 and 14).

The additional 200 acre-feet of storage contemplated under Application 16917 will be provided by sandbagging the

spillway of Austrian Dam to a height of about 2 feet. The State Department of Water Resources, which has jurisdiction over safety of dams, has granted the San Jose Water Works permission to install these sandbags between May 15 and October 1 of each year (R. T., p. 38). Permission by the Department of Water Resources may also be granted in any one year allowing sandbags to be installed between May 1 and May 15, but any storage effected prior to May 1 presumably would be under Permit 7154 (Application 11693) (R. T., p. 38).

Protestant's Project

Protestant Lester's diversion works consist of a well and pumping plant within the reservoir area of Vasona Dam which divert only the subsurface flow of Los Gatos Creek. The pumping plant consists of two pumps having a combined capacity of about 2,300 gpm. As there is a steel cutoff wall in Vasona Dam, the protestant claims that he is able to capture practically all of the subsurface flow at this point (R. T., pp. 73, 75, 76, and 95).

Between 400 and 450 acres are irrigated through the Lester diversion system, of which 190 acres are owned by protestant Lester (R. T., p. 83).

Water is sold to neighboring farms which comprise the remaining acreage. In recent years some of the area not owned by the protestant has been sold and subdivided. The irrigation season is usually between May 1 and July 1; however, in some years irrigation may start as early as April 1 and continue as late as the middle of July (R. T., pp. 83 and 85). According to William

W. Lester, Jr., the water supply at their point of diversion has been diminishing over the years, that although the water supply has been adequate during years of high rainfall or when Lexington Dam was substantially full, other years the supply has been insufficient for their needs (R. T., p. 72).

Lexington and Vasona Operation

Lexington Reservoir has a capacity of 25,100 acre-feet and is used to store winter runoff under Permit 7689 (Application 11751) for later release to percolation areas to replenish the underground basin. Water is released from Lexington Reservoir into the natural stream channel and flows to Vasona Reservoir, having a capacity of 750 acre-feet. Water is then released on downstream for percolation in the natural stream channel or diverted at Vasona Dam into a pipeline and ditch system to other percolation areas (R. T., pp. 27 and 28).

Water Supply

The drainage area above Austrian Dam is about 10 square miles and, depending on the rainfall, the annual runoff from this area supplies 25 to 40 per cent of the total supply utilized by the San Jose Water Works (R. T., p. 21). The remainder of the water used by the San Jose Water Works is supplied from a system of wells. According to Mr. Nat H. Kendall, Chief Engineer, San Jose Water Works, it is becoming difficult to increase the amount of water derived from the well field because of zoning restrictions against installation of wells in residential areas and quality of water limitations (R. T., pp. 20, 21, and 22).

Lexington Reservoir, which collects winter flood flows that would waste into San Francisco Bay, has created a controlled stream below Lexington Dam. There are approximately 38 square miles of drainage area above Lexington Dam. Since the runoff from this area is now released downstream after the winter season, water is available over a much longer period than existed prior to construction of the dam. This is supported by testimony that in most years prior to the construction of Lexington Reservoir flow stopped after May 1 below Jones Dam at the town of Alma, both now under water in Lexington Reservoir. Jones Dam, the original point of rediversion for San Jose Water Works was replaced by Ryland Dam during the construction of Lexington Dam (R. T. pp. 28 and 33).

Inasmuch as the runoff of the watershed above protestant Lester is now controlled to a major extent by Austrian Dam of the applicant and by Lexington Dam of Santa Clara Valley Water Conservation District, the availability of water at his point of diversion during his irrigation season is principally dependent upon spillage or releases from those structures. The operation of Lexington Dam which is located downstream from both Austrian Dam and Ryland Dam, the latter being the point of rediversion of water released from Lake Elsmann, will have by far the greatest effect on the protestant's water supply.

Table 1, based on Applicant's Exhibit 4 and information secured from the district subsequent to the hearing and incorporated by stipulation of the parties into the record by reference, presents a summary of operation of Austrian and Lexington Dams

since 1953. The same sources of information show by the following tabulation the quantities of water which were released from Lexington Reservoir during the period of May 1 to July 1, the protestant's normal irrigation season:

<u>Year</u>	<u>Quantity Released from Lexington Reservoir between May 1 and July 1 in Acre-feet</u>
1953	4263
1954	7475
1955	2248
1956	6249
1957	1901

Average 4427

Table 1
 Comparison of Lexington Dam and Austrian Dam Operations
 Acre-Feet

Date	Lexington		Austrian	
	Storage	Release ^{1/}	Storage	Spill ^{2/}
<u>1953</u>				
May 1	4,846	8,056	6,157	
June 18	Empty	12,319	5,937	1,644
July 1	Empty	12,319	5,500	1,644
<u>1954</u>				
May 1	7,577	1,863	6,137	
July 1	2,368	7,058	5,475	600
<u>1955</u>				
May 1	2,208	4,798	3,500	
May 24	Empty	7,046	3,900	0
July 1	Empty	7,046		0
<u>1956</u>				
May 1	23,350	8,650	6,147	
July 1	17,351	14,731	5,475	897 ^{3/}
<u>1957</u>				
May 1	1,331	13,257	2,900	
May 11	Empty	14,288	3,100	0
May 21	970 ^{4/}	14,288	3,500	0
May 29	Empty	15,158	4,100	0
July 1	Empty	15,158	4,500	0

- 1/ Accumulative release since preceding October 1.
- 2/ Total flow over spillway, May 1 to July 1.
- 3/ 150 acre-feet additional stored by sandbagging spillway.
- 4/ Greatest storage after closing gates May 11 and starting new releases May 22.

It may be seen from Table 1 that in two of the years (1955 and 1957) since beginning of operation of Lexington Reservoir, no spill over Austrian Dam occurred. In two of the years (1954 and 1956) when spill did occur, water remained in storage in Lexington Reservoir after July 1. In only one year (1953) when there was sufficient spill over Austrian Dam to supply the 200 acre-feet requested in Application 16917 was Lexington Reservoir drained prior to July 1. In that particular year 4,263 acre-feet were released from Lexington Reservoir during the period May 1 to June 18.

Discussion

From the foregoing it is evident that generally when water is available for the applicant to appropriate in the manner contemplated in Application 16917 there is also considerable water in Lexington Reservoir, subject to release, which will to a large extent be available to supply the protestant's requirements. The apparent increase in the flow of Los Gatos Creek below Los Gatos from May 1 to July 1 since the operation of Lexington Reservoir indicates that more water is available to the protestant during his irrigation season than existed prior to construction of Lexington Dam. Although the water impounded by Santa Clara Valley Water Conservation District in the reservoir under Permit 7689 is not considered by the Board as being a part of the supply which must go to satisfy the protestant's requirements, the evidence shows that the protestant's position has actually been improved since construction of Lexington Dam,

and the possibility of being adversely affected by the impoundment of an additional 200 acre-feet of water during the years that such water is actually available is not apparent.

The failure of protestant Cothran to appear at the hearing or to show cause for his failure to appear within the time allowed by law is assumed by the Board as an indication of abandonment of interest, in accordance with Section 731 of the Board's rules, and his protest is accordingly dismissed. However, it should be noted that evidence (San Jose Water Works, Exhibit 2) and testimony presented at the hearing indicate that Mr. Cothran's property is not riparian to Los Gatos Creek, as claimed in his protest, that instead the nearest point of his property to the creek is over 50 feet, that he obtains his water supply from a tributary of Los Gatos Creek downstream from Austrian Dam and accordingly, possible injury by the proposed appropriation is not apparent.

Conclusions

The information indicates, and the Board finds that unappropriated water exists at times in the sources from which the applicant seeks to appropriate, and that such water may be taken and used substantially in the manner proposed by the applicant without injury to protestant Lester. It is, therefore, the conclusion of the Board that Application 16917 should be approved and that a permit should be issued subject to the usual terms and conditions, provided the season of collection to storage is confined to that period during which the Department of Water

Resources permits the installation of sandbags in the spillway of Austrian Dam; namely, May 1 to October 1.

ORDER

Application 16917 having been filed, protests having been submitted, a hearing having been held by the Board, and said Board now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 16917 be, and the same is hereby approved and it is ordered that a permit be issued to applicant subject to vested rights and to the following terms and conditions, to wit:

1. The amount of water appropriated shall be limited to the amount which can be beneficially used and shall not exceed 200 acre-feet per annum by storage to be collected from about May 1 to about October 1 of each year.

2. The maximum amount herein stated may be reduced in the license if investigation so warrants.

3. Complete application of the water to the proposed use shall be made on or before December 1, 1961.

4. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.

5. All rights and privileges under this permit including method of diversion, method of use and quantity of water diverted are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of

the public welfare to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

Adopted as the decision and order of the State Water Rights Board at a meeting duly called and held at Fresno, California, on this 4th day of December, 1958.

/s/ Henry Holsinger
Henry Holsinger, Chairman

/s/ W. P. Rowe
W. P. Rowe, Member

/s/ Ralph J. McGill
Ralph J. McGill, Member